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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

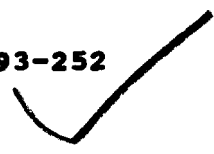
In the Matter of

Implementation of
Sections 3(n) and 332 of the
Communications Act

Regulatory Treatment of
Mobile Services

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GN Docket No. 93-252



COMMENTS OF WATERWAY COMMUNICATIONS SYSTEM, INC.

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November 8, 1993

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SUMMARY

In adopting definitions and regulatory classifications relating to existing services, Waterway Communications System, Inc. ("WATERCOM") urges the Commission to retain common carrier (commercial mobile service) status for services which traditionally have been regulated as common carriage, particularly including the maritime services. The definitional criteria discussed by the Commission, e.g., user control of interconnection access to the public switched network, size market served, etc., may be appropriate considerations in determining whether services which traditionally have been regulated as private should be classified as "commercial" under Section 332(d) of the Act; however, said criteria should not be applied to services which historically have been deemed common carriage. Moreover, dispatch, which Section 332(c)(2) of the Act implies is not available to common carriers, in fact has been part of the maritime common carrier service offering for decades, if not since the inception of maritime common carrier telecommunications services. Accordingly, the Commission should exercise its authority under Sections 332(c)(2) to assure that maritime common carriers can continue to render dispatch service.

WATERCOM concurs with the Commission's proposals with regard to application of the exemption authority from

- iii -

Title II requirements granted under Section 332(c)(1) of the Act. WATERCOM further urges the Commission to exempt mobile common carriers from the application of Sections 225 and 226 of the Act.

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COMMENTS OF WATERWAY COMMUNICATIONS SYSTEM, INC.

Waterway Communications System, Inc. ("WATERCOM"), by its attorney, respectfully submits its Comments responsive to the Notice of Proposed Rulemaking issued by the Federal Communications Commission to implement Section 332 of the Communications Act, as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 ("OBRA").^{1/}

I. STATEMENT OF INTEREST.

WATERCOM operates maritime common carrier services in the VHF, MF and HF frequency bands. WATERCOM is the licensee of the Automated Maritime Telecommunications System ("AMTS") which provides service to the maritime community along the Mississippi, Illinois and Ohio Rivers, and the Gulf Intracoastal Waterway. WATERCOM also is the operator

^{1/} 58 Fed. Reg. 53,169 (Oct. 14, 1993).

of VHF and MF/HF public coast station services operating from locations in the vicinity of Louisville, Kentucky.

Prior to OBRA, WATERCOM has been treated as a common carrier with regard to all of its maritime public service offerings. But for an issue concerning application of the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA") to AMTS operations,^{2/} common carrier status has not been burdensome in the rendition of services to the maritime community. On the other hand, common carrier status entails certain benefits. From an operational standpoint, the rights of interconnection with the landline telephone network are well-defined, and are available at a level which not only is appropriate but more importantly is necessary to the rendition of quality service to the user community. Moreover, common carriers enjoy protected frequency assignments, and the procedural safeguards of Section 309 of the Communications Act apply to applications for radio frequency authority by common carriers. Accordingly, maintenance of common carrier status is highly important to WATERCOM.

^{2/} See, Petition of GTE, File No. MSD 92-14, discussed at pp. 10-12, infra.

II. COMMENTS.

A. Definitions and Regulatory Classification of Existing Services.

Maritime common carriers necessarily provide "mobile service" as defined by Section 3(n) of the Act; and said service is "commercial" in nature in that the service is provided for profit, is available to the public and, at the user's option, is interconnected with the public switched network.

As a maritime common carrier, under both Commission regulation and the international Radio Regulations, service must be made available to the user public at large. The discussion in the NPRM of the application of the "commercial mobile service" definition appears inherently to be framed in the context of addressing the issue of whether entities currently recognized as for-hire service which currently is classified as "private" in nature, i.e., regulated under FCC Part 90, may come within the "commercial mobile service" definition. Accordingly, WATERCOM submits that the Commission should not re-examine whether entities currently recognized as common carriers are commercial mobile service providers under Section 332 of the Act.

Notwithstanding the foregoing, WATERCOM feels constrained to observe that in addressing the question of whether services are provided for-profit and whether they

are offered to customers for profit or for internal use, one nuance not addressed in the Notice concerns the rendition of service by a common carrier to an affiliate. This situation involves WATERCOM inasmuch as one of its customers is a corporately-affiliated maritime transportation company. WATERCOM treats said affiliate as a customer, which is charged the same tariff rates as are charged to the numerous unrelated entities which comprise the vast majority of WATERCOM's customers. Service to affiliates long has been recognized not only in the maritime common carrier services but also in the domestic public radio services, and the Commission should avoid drawing any distinctions which may have the effect of modifying existing policy.

In examining the "commercial mobile service" definition, the Commission devotes substantial attention to the interconnection requirement. Among the issues raised is whether interconnection inherently entails allowing subscribers directly to control access to the public switched network. While the WATERCOM AMTS operates in direct-dial fashion in both ship-to-shore and shore-to-ship directions, direct interconnect generally is not available in the maritime VHF or MF/HF services. Automatic interconnection has been impractical or infeasible in these services for a variety of reasons. While direct dial can be readily implemented in the VHF public coast station service

in the ship-to-shore mode, so implementing in the shore-to-ship direction is not feasible for several reasons. First, the shipboard radio serves multiple functions, namely, for common carriage, operational and distress and safety purposes, all of which share a common calling channel. Moreover, calls to vessels on the rivers, lakes or open seas require knowledge of location of the vessel so to route the call to the appropriate serving coast station; and this may prove difficult or at a minimum entail a trial-and-error approach.^{3/} In addition, the Commission has allotted only nine (9) channels for public coast station service; and in busy port areas, access to these channels is subject to queueing, which is administered manually. With regard to MF/HF service, manual call set-up is necessary to permit the selection of an appropriate frequency band as well as for traffic quality control purposes. All of these factors mitigate against automatic interconnect. Manual interconnect has been an essential aspect of maritime common carriage, and OBRA provides no basis for changing this status.

In examining the Section 332(d) definition of "commercial mobile service," the Commission discusses the clause under Paragraph (1)(b) that such service, as an

^{3/} The preponderance of VHF maritime public correspondence flows in the ship-to-shore direction.

alternative to being available to the public, is 'effectively available to a substantial portion of the public.'" In this context, the Commission invites comments on whether system capacity should be a factor in determining whether a provider offers a commercial or private service. Again, this issue appears to relate to Part 90 private services and not to long-recognized common carriage. Inasmuch as maritime common carriage is required to be available to the user public at large, such service should be deemed rendered under Section 332(d)(1)(A), and the application of subparagraph B should be irrelevant. As far as the latter is concerned, however, the concept of system capacity has no place in determining whether a service is "commercial" or "private" in nature. Maritime VHF public coast station frequencies are assigned on the basis of one (1) per station, with additional channels being licensed as a need is shown to exist by a channel loading study.^{4/} Similarly, there are a very limited number of MF and HF channels available for inland maritime carriers; and accordingly, channel assignments are limited to one frequency per band per station.^{5/} Channel assignments are a function of spectrum allocations and operating conditions in

^{4/} See, 47 C.F.R. § 80.371(c).

^{5/} Id. at § 80.371(b)(4).

the service (e.g., cellular with frequency re-use vs. high-powered, centralized operations); they are not related to the issue of whether the licensee holds out service indiscriminately to the general public.^{6/}

Finally, the Commission raises the issue of whether dispatch should be permitted to commercial mobile service providers. The dispatch prohibition has been applied only in the area of land mobile services. From a maritime standpoint, dispatch, or message relay, has been an essential part of the maritime carriers' service offerings for decades. Message relay service facilitates the operations of both maritime common carriers and vessel operators. Given the potential difficulties in locating and reaching vessels on shore-initiated calls, the manual nature of maritime service and the custom of vessels preferring to send and receive certain traffic during times which customarily are slow from an operations standpoint, e.g., midnight to 6 a.m., it is necessary for the Commission to exercise the authority conferred under Section 332(c)(2) to "terminate, in whole or in part, the prohibition" on common carriers rendering dispatch service on common carrier frequencies inasmuch as said operations both currently exist

^{6/} Similarly, the issue of frequency re-use, raised at ¶ 32 of the Notice, is a function of operational style rather than the nature of the service being rendered.

in the maritime common carrier services and continue to be required.

B. Application of Title II to Commercial Mobile Services.

WATERCOM generally concurs with the Commission's proposal with regard to exception from, and retention of, the applicability of certain provisions of Title II of the Communications Act in exercise of the Commission's power found at Section 332(c)(1) to exempt commercial mobile service providers from Title II requirements.

With regard to tariffing, Section 214 exit authority and related provisions, the Commission tentatively has concluded that maritime is a fully-competitive service (unless affiliated with a connecting landline carrier) in the PR Docket 92-257 maritime rulemaking in which the Commission proposed nondominant status for maritime carriers. It is respectfully submitted that the record compiled in that proceeding be considered herein and that said record warrants forbearance (except for the aforementioned affiliated carriers) from the application of Sections 203, 204, 205, 211 and 214 of Title II of the Act. WATERCOM understands both the statutory authority and the NPRM to contemplate relief from the tariffing requirements of the Act on a permissive basis. There are benefits in

tariffing services; and to the extent that carriers desire to maintain tariffs on file, the Commission should permit mobile common carriers to do so.

WATERCOM further concurs with the proposals to exempt commercial mobile service providers from certain "operational" provisions of the Act, as outlined at ¶ 67 of the Notice. WATERCOM sees no need to belabor these proposals in that said provisions have not been major issues to the carriers or the Commission in the regulation of mobile common carrier services in the past.

The Commission further invites comments on forbearance from application of Sections 223, 225, 226, 227 and 228 of the Act. Of these provisions, only Section 225, concerning telecommunications services for speech and hearing impaired individuals, and Section 226, pertaining to operator services, are of interest to WATERCOM. WATERCOM is a participant in the Declaratory Ruling proceeding concerning Section 226, Petition for Declaratory Ruling That GTE Airfone, GTE Railfone and GTE Mobilnet Are Not Subject to the Telephone Operator Consumer Services Improvement Act of 1990, File No. MSD 92-14.

With regard to Section 225 of the Act, telecommunications relay services are universally available throughout the United States on a dial access basis. WATERCOM supports the goals of the ADA and of Section 225 of

the Act. On the other hand, this provision has virtually no application to WATERCOM's service. With minor exception, WATERCOM's service is rendered to towboats and other similar commercial vessels. From a safety standpoint, speech and hearing capabilities are bona fide occupational qualifications. Approximately one percent (1%) of WATERCOM's service relates to public access vessels, i.e., cruise boats and dinner boats operating on the inland waterways. Passengers of those vessels who may be speech or hearing impaired would be fully familiar with TRS operating procedures; and, as noted above, TRS is available on a dial access basis. Accordingly, WATERCOM urges that maritime carriers be exempted from Section 225 of the Act since said provision is not necessary to assure that charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory, or for the protection of consumers, and such an exemption is consistent with the public interest.

WATERCOM further requests exemption from Section 226 of the Act, concerning operator services. WATERCOM has fully detailed the inappropriateness of applying TOCSIA to its AMTS service in the GTE Declaratory Ruling proceeding, most recently in a Petition for Reconsideration of the ruling released August 27, 1993. WATERCOM incorporates that

Petition herein, and associates a copy with these Comments as Attachment A for convenient references.

As set forth in WATERCOM's Petition for Reconsideration, it makes no sense from a consumer protection standpoint, and to ensure that charges, practices, classifications and regulations are just and reasonable, to enforce the operator service provider regulations in such a way as to require bifurcation of mobile call responsibility among carriers. In contrast to the typical OSP situation, where one can avoid the predesignated OSP by invoking the equal access protocol, a telephone user on a WATERCOM-equipped cruise vessel cannot avoid WATERCOM and its charges and still complete the intended call. At a minimum, a telephone user would be obligated to pay WATERCOM's radiolink charge for completion of the call between the vessel and the landline point of interconnection since there is no alternative to WATERCOM's radio path to provide connection with the landline network. Furthermore, from an equal access perspective, it is noteworthy that AT&T, in its further comments in MSD 92-14 regarding the compensation level for Petrocom, suggested that the equal access principles be modified to allow the OSP/IXC to determine whether it wishes to

participate in calls from the radio-based carrier.^{1/} This approach illustrates the incompatibility of applying TOCSIA to mobile and other radio-based services since the consumer likely will end up without having access to the OSP/IXC of choice if the latter can opt out of providing connecting service. Moreover, TOCSIA did not contemplate application to mobile services where the operator function, whether entailing billing or otherwise, is an incidental function of the service offering rather than the primary function of the OSP's operations. Indeed, the cost of compliance, in contrast to the typical OSP situation, so exceeds the benefit and the rule of reason as to threaten continuation of service to public access vessels by WATERCOM.^{2/}

III. CONCLUSION.

WATERCOM urges the Federal Communications Commission to give recognition to the traditional role and services provided by maritime common carriers. WATERCOM urges the

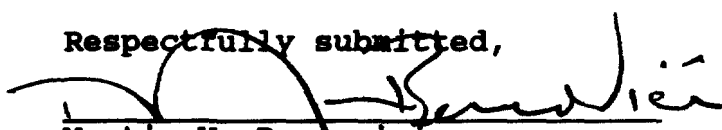
^{1/} As set forth in the Further Comment stage in MSD 92-14 by Petrocom, AT&T and MCI, whether using a market-based rate for compensating the mobile service carrier or a cost-based factor, the compensation to which the mobile service carrier would be entitled for provision of the radio path between the pay telephone and the point of interconnection undoubtedly would exceed the regular toll charges applied by the landline IXC which also renders operator services. See, MCI Reply at p. 3.

^{2/} See, WATERCOM Petition for Reconsideration at p. 10.

Commission to continue common carrier recognition for those services and entities which heretofore have operated as common carriers serving the maritime community and, in doing so, to assure that the new regulatory regime governing commercial mobile service providers does not adversely impact upon maritime carriers' ability to serve the user public. Finally, WATERCOM urges the Commission to impose minimal regulation necessary for protection of the user community, including providing exemption from application of Sections 225 and 226 of the Communications Act for commercial mobile service providers.

WHEREFORE, THE PREMISES CONSIDERED, Waterway Communications System, Inc., respectfully urges the Federal Communications Commission to adopt classifications and regulations governing mobile service providers consistent with the foregoing Comments.

Respectfully submitted,



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Date: November 8, 1993

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Federal Communications Commission **SEP 27 1993**

WASHINGTON, D.C. 20554

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
Petition for Declaratory Ruling)
)
That GTE Airfone, GTE Railfone,) File No. MSD 92-14
and GTE Mobilnet Are Not)
Subject to the Telephone)
Operator Consumer Services)
Improvement Act of 1990)

To: Acting Chief, Common Carrier Bureau

**PETITION OF
WATERWAY COMMUNICATIONS SYSTEM, INC.
FOR RECONSIDERATION OR FOR ALTERNATIVE RELIEF**

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September 27, 1993

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SUMMARY

Waterway Communications System, Inc. (WATERCOM) requests reconsideration of the Declaratory Ruling issued August 27, 1993, wherein the Acting Chief, Common Carrier Bureau, found that Automated Maritime Telecommunications Service and other mobile common carrier services are subject to the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).

TOCSIA was intended to assure consumers the opportunity to select the carrier to handle their interexchange telephone traffic. The declaratory ruling overlooks the fact that in a mobile environment, the radiolink is the essential element of the service rendered. Since WATERCOM is entitled to charge for its airtime, the Bureau's ruling would entail the interjection of a second OSP into call processing. TOCSIA was intended to afford customers the right of choice of serving carrier, not the right to require the serving carrier to segregate calls into component parts in order to apply TOCSIA to down-stream components.

As an alternative to the Declaratory Ruling requested herein, the Commission may exempt commercial mobile service carriers from TOCSIA pursuant to the authority conferred upon the Commission by Section 332(c) of the Communications Act, as amended by the Omnibus Budget Reconciliation Act of 1993. The Commission has initiated a rulemaking pursuant to this latter authority, PR Docket No. 93-252, in which it is considering exemption of mobile service carriers from the TOCSIA requirement. Exercise of the Commission's authority under the new Section 332(c) provisions would serve to moot this request.

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Subject to the Telephone)	
Operator Consumer Services)	
Improvement Act of 1990)	

To: Acting Chief, Common Carrier Bureau

**PETITION OF WATERWAY COMMUNICATIONS SYSTEM, INC.
FOR RECONSIDERATION OR FOR ALTERNATIVE RELIEF**

Waterway Communications System, Inc. (WATERCOM), pursuant to Section 1.106 of the Commission's Rules,^{1/} respectfully herewith petitions the Acting Chief, Common Carrier Bureau ("Bureau") to reconsider and reverse the Declaratory Ruling released August 27, 1993, in the matter referenced above.^{2/} In this Declaratory Ruling, the Bureau found that the above-captioned services and also services rendered by parties supporting Petitioner, who were treated as separate Petitioners in the Declaratory Ruling and separately addressed in the Ruling,^{3/} are subject to regulation as operator services providers (OSPs) and aggregators pursuant to the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA)^{4/} and the

^{1/} 47 C.F.R. § 1.106.

^{2/} DA 93-1022, ___ FCC Rcd ___ (1993).

^{3/} See, Declaratory Ruling at n.4.

^{4/} 47 U.S.C. § 226.

Commission's implementing regulations. WATERCOM was one of those parties supporting Petitioner, and its service was addressed at paragraphs 23-24 of the Declaratory Ruling. This Petition addresses the Declaratory Ruling only as it pertains to WATERCOM.^{5/}

Waterway Communications System, Inc. respectfully submits that the Declaratory Ruling was wrong as a matter of law, ignored statutory intent and purpose, and misconstrued facts. As an alternative to ruling that WATERCOM's services are not embraced within TOCSIA, WATERCOM requests that WATERCOM's Automated Maritime Telecommunications Service be exempted from TOCSIA pursuant to Section 332(c) of the Communications Act of 1934 as amended by Section 6002(b)(2)(A) of the Omnibus Budget Reconciliation Act of 1993 (OBRA).

I. STATEMENT OF INTEREST

WATERCOM is the licensee of an Automated Maritime Telecommunications System (AMTS) licensed under Part 80 of the Commission's Rules and regulations. The WATERCOM system, located along the Mississippi, Illinois and Ohio

^{5/} The Bureau erroneously characterizes WATERCOM's position on the GTE Petition as not disputing the fact that it is an OSP. Declaratory Ruling at n.36. WATERCOM specifically supported the GTE position and further attempted to demonstrate why TOCSIA and the OSP regulatory scheme are inconsistent with maritime mobile service. To the extent the statutory language is less than crystal clear, and thus gave rise to the requests for declaratory ruling, WATERCOM's Reply Comments set forth the governing principles of statutory interpretation, including that legislative intent should be honored even where the statutory language "may appear [clear] on 'superficial interpretation.'" United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940).

Rivers and the Gulf Intracoastal Waterway, provides telecommunications service for the maritime industry operating along the 4,000-mile inland waterway transportation network. WATERCOM, since the inception of service, has operated as a common carrier, and now is deemed a "commercial mobile service" provider under 47 U.S.C. § 332(c) as amended by OBRA.

II. TOCSIA IS NOT APPLICABLE TO AUTOMATED MARITIME TELECOMMUNICATIONS SERVICE

In the aftermath of the AT&T divestiture, as regulation of the telecommunications industry changed, the operator services industry evolved to include companies offering alternatives to the traditional Bell System-provided services. These companies, sometimes referred to as Alternative Operator Service Providers, typically leased lines from telephone carriers and combined these transport elements with their own operator services. Like the traditional OSPs, the alternative OSPs entered enter into contracts to provide operator services to "call aggregators."^{6/} Effectively, the owner of the telephone would select the operator services company and block alternative access, thereby depriving the person placing the call of the option to select the carrier to provide operator and interexchange services.^{7/} As a result of widespread

^{6/} Id., see, also, e.g., Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Notice of Proposed Rulemaking, 5 FCC Rcd 4630 (1990).

^{7/} See, 5 U.S. Code Cong. & Admin. New 1990 at 1577, 1578.

complaints concerning the "capturing" of interexchange calls from airports, hotels and other similar public locations through presubscription to particular OSPs and rate gouging by those OSPs, Congress mandated regulation of the OSPs through enactment of TOCSIA in the Fall of 1990. The Act, its legislative history, and the Commission's implementing rulemakings make clear that TOCSIA was intended to remedy the abuses perpetrated by certain parties which interjected themselves into interexchange call processing solely for the purpose of handling billing or other operator services and who, due to the presubscription of the public telephone lines, precluded users the freedom to access their carrier of choice for the provision of interexchange call handling, including the billing and operator functions.^{8/}

AMTS and other mobile services neither were the subject of the multitude of complaints received by the Commission and Congress concerning OSPs, nor intended to be covered by TOCSIA, nor operate in the manner which TOCSIA is intended to remedy. Indeed, before an issue was raised by TOCSIA and the GTE petition, neither WATERCOM nor its customers considered WATERCOM to be an "alternative" or even a regular "operator services provider." Rather, WATERCOM was and is a facilities-based provider of end-to-end maritime telecommunications services which, for a minuscule portion

^{8/} Id.

of its traffic, serves the general public.^{2/} WATERCOM's general public or transient user service entails access to the WATERCOM system by passengers aboard river cruise boats and harbor cruise or dinner boats where the vessel operators have made communications service available to their passengers. For these calls, a credit card or calling card is accepted for payment purposes, thereby raising the issue of TOCSIA applicability. These users comprise less than 1% of vessels carrying the WATERCOM AMTS subscriber unit, and the passenger use of the WATERCOM system is estimated to account for less than 1% of calls through the WATERCOM system.

In contrast to the OSPs regulated by TOCSIA, which utilize the local exchange service to connect the pay telephone to the OSP, bypassing other OSPs or IXC's, WATERCOM itself furnishes the crucial initiating circuit, connecting the vessel with WATERCOM's shore station through the WATERCOM radiolink. A WATERCOM call is routed into the landline network for completion to the called number either via WATERCOM's switch at the local serving shore station,^{10/} or it may be transferred to the WATERCOM Operations and Control Center (OCC) where an operator will assist in call completion.

^{2/} In general, WATERCOM's service is utilized by the commercial river industry and thus is not arguably within the scope of TOCSIA.

^{10/} WATERCOM operates 54 shore stations along the 4,000 miles of waterways it services.